(2)

No. 06-803

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SUPREME COURT, U.S.

In the Supreme Court of the United States

JOHN DAMON,

Petitioner,

v.

AIR PACIFIC LTD., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

"Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, respondent Qantas Airways Limited ("Qantas") states that it has no parent companies and no company owns more than 10% of its stock. Respondent Air Pacific Ltd. ("Air Pacific") states that it is 51% owned by the Fiji Government and 46% owned by Qantas.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is unofficially reported at *Damon v. Air Pacific Ltd.*, 2006 WL 2817997, 31 Avi. Cas. (CCH) 18,135, 171 Fed.Appx. 566 (9th Cir. October 2, 2006). The opinion has not been officially reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on October 2, 2006. The jurisdiction of this Court is invoked by petitioner pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *See* Rule 10 of the Rules of the United States Supreme Court. A petition for a writ of certiorari will be granted only for compelling reasons. *Id.* Petitioner fails to offer any compelling reason why the Court should grant his petition.

This Court has denied two petitions for writ of certiorari that were submitted on identical grounds as are presented here. *See Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914, (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (March 21, 2005) (No. 04-970), and *Blotteaux v. Qantas Airways, Ltd.*, 2006 WL 475458, 29 Avi. Cas. (CCH) 17,477 (9th Cir. March 1, 2006), *cert. denied*, 127 S. Ct. 82 (October 2, 2006) (No.

05-1516).[1] Petitioner has failed to offer any compelling reason why the Court should grant review in this case.

In light of the foregoing, and as more fully set forth below, the Court should deny petitioner's petition for writ of certiorari in its entirety.

ARGUMENT

I

PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT DECLINED TO GRANT PETITIONS FOR WRITS OF CERTIORARI SUBMITTED ON IDENTICAL GROUNDS

In *Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (March 21, 2005) (No. 04-970), and *Blotteaux v. Qantas Airways, Ltd.*, 2006 WL 475458, 29 Avi. Cas. (CCH) 17,477 (9th Cir. March 1, 2006), *cert. denied*, 127 S. Ct. 82 (October 2, 2006) (No. 05-1516), this Court denied petitions for writs of certiorari submitted on identical grounds as are presented by petitioner here.

In both *Rodriguez* and *Blotteaux*, the Question Presented to the Court by the petitioners was:

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[1] Significantly, the Questions Presented and the Arguments contained in the *Rodriguez* and *Blotteaux* petitions are almost identical to the Question Presented and the arguments set forth in the petition here. This is no coincidence as petitioners' counsel in *Rodriguez* and *Blotteaux* is petitioner's counsel in this matter.

> Does an international carrier's failure to warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk which is known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

See Petition for Writ of Certiorari, p. i, in *Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (March 21, 2005) (No. 04-970), and Petition for Writ of Certiorari, p. i, in *Blotteaux v. Qantas Airways, Ltd.*, 2006 WL 475458, 29 Avi. Cas. (CCH) 17,477 (9th Cir. March 1, 2006), *cert. denied*, 127 S. Ct. 82 (October, 2, 2006) (No. 05-1516).

In this case, the Question Presented is:

> Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

See Petition for Writ of Certiorari, p. I.

Not surprisingly, the petitioners in *Rodriguez* and *Blotteaux* asserted similar, if not identical, arguments in support of their petitions as petitioner asserts here. This Court declined to grant review in *Rodriguez* and *Blotteaux*. Accordingly, as in *Rodriguez* and *Blotteaux*, the Court should deny the petition for writ of certiorari here.

II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioner seeks this Court's review of the Ninth Circuit's decision below on the grounds that the Ninth Circuit's decision is in conflict with this Court's decision in *Olympic Airways v. Husain*, 540 U.S. 644 (2004). *See* Petition for Writ of Certiorari, pgs. 8-9. Petitioner's argument is incorrect.

In *Olympic Airways v. Husain*, 540 U.S. 644 (2004), the airline was held liable for a passenger's fatal asthma attack after the flight attendant repeatedly refused to move the passenger out of proximity to the airplane's smoking section, despite numerous requests from the passenger's wife, who indicated that an allergy to cigarette smoke made that move imperative. *See Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004). This Court found that the flight attendant's refusal to assist the passenger was an "unusual" and "unexpected event" that satisfied the "accident" requirement of Article 17 of the Warsaw Convention and, therefore, the airline was liable for the passenger's death. *Id.*

The present case is factually distinguishable from *Husain* because it is undisputed that in this case flight personnel were not asked to assist petitioner in any way and were not notified of any discomfort on his part. *See* Petition for Writ of Certiorari, Appendix at 6a.

In *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (March 21, 2005) (No.

04-970), the Ninth Circuit unequivocally found that the occurrence of DVT on an otherwise unremarkable flight does not constitute an "accident" because, pursuant to this Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), the condition was precipitated not by any unexpected or unusual event or happening but instead by the passenger's own internal reaction to normal aircraft operation.[2] *Id.* at 917.

The Ninth Circuit in *Rodriguez* correctly distinguished this Court's decision in *Husain* on the grounds that it involved a response by the flight crew to the passenger's medical condition, a distinction equally applicable here. *Id.* at 918. Consequently, with respect to an airline passenger's development of DVT under normal flight conditions, the Ninth Circuit held in *Rodriquez* that no "accident" under the Warsaw Convention could have occurred under circumstances such as those presented here. In the present case, the Ninth Circuit below correctly followed its decision in *Rodriguez*.

In light of the foregoing, petitioner has failed to show how the Ninth Circuit's decision conflicts with any decision of this Court.

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[2] Contrary to Petitioner's suggestions, the Ninth Circuit's decision is entirely consistent with this Court's decision in *Air France v. Saks*, and indeed constitutes the exact type of situation contemplated by the Court in *Saks*.

III
THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT

Petitioner asserts that there is a conflict between the Ninth Circuit's decision below and the decisions of other Circuits, but has failed to articulate which other Circuits it is conflict with, and how the Ninth Circuit's decision is in conflict with those Circuits' decisions.

Petitioner attacks the Fifth Circuit's decision in *Blansett v. Continental Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004), *cert. denied*, 543 U.S. 1022 (Dec. 6, 2004) (No. 04-541), as being in conflict with the decision of this Court in *Husain* but fails to identify the alleged conflict between the Fifth Circuit and Ninth Circuit. In fact, the Ninth Circuit's decision is in accord with the Fifth Circuit's decision in *Blansett*.

In *Blansett*, the Fifth Circuit held that the absence of a DVT warning on a flight governed by the Warsaw Convention was not an "accident" under Article 17 of the Warsaw Convention. *Blansett*, 379 F.3d at 181-82. Here, the Ninth Circuit found that its decision in *Caman v. Continental Airlines*, 455 F.3d 1087 (9th Cir. 2006), "definitely resolves the DVT failure to warn issue." *See* Petition for Writ of Certiorari, Appendix at 3a.

Accordingly, there is clearly no conflict between the Fifth Circuit and the Ninth Circuit based on the Ninth Circuit's decision below, and on this ground the petition should be denied.

IV

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION COMPORTS WITH THE DECISIONS OF SISTER SIGNATORIES TO THE WARSAW CONVENTION AND THUS FURTHERS THE WARSAW CONVENTION'S GOAL OF UNIFORMITY

With over 120 contracting states, the Warsaw Convention is one of the most widely adhered to treaties in the world, and for more than 70 years the Convention has governed the liability of carriers providing air transportation throughout the world. The uniform and consistent interpretation and application of the Convention, one of its primary goals, is not only highly desirable but is mandated by this Court. *See El Al Israel Airlines v. Tseng*, 525 U.S. 155, 169 (1999). As stated by the Court, in interpreting the Convention the "opinions of our sister signatories" are "entitled to considerable weight." *Tseng*, 525 U.S. at 176, quoting Saks, 470 U.S. at 404.

The courts of England, Canada, Australia and France, have uniformly concluded that the failure to warn of the risk of DVT cannot be an Article 17 "accident." *See DVT Air Travel Group Litigation*, [2005] UKHL 72 (House of Lords); *Povey v. Civil Aviation Safety Authority and Ors* [2005] HCA 33 (High Court of Australia), available at 2005 WL 1460709; *Gillet v. Air Canada, Matter* 01/10567, Chamber 7/Section 0 (France); *Rynne v. Lauda-Air Luftfarht Aktiengesellschaft*, D5586/2001 (D.C., Queensland, Australia, Feb. 7, 2003); *Van Luin v. KLM Airlines*, No. 10377 of 2001 at 50 (D.C., New South Wales, Australia, Oct. 11, 2002); *McDonald v. Korean Air*, No. 01-B30373, 2002 WL 1861837 at 17 (Ont. S.C.J. Sept. 18,

2002), *aff'd*, No. C38853 (Ont. C.A. Feb. 18, 2003), *leave to appeal refused*, (2003), 191 O.A.C. 398 (note), 321 N.R. 193 (note), 2003 Carswell Ont 5835, 2003 Carswell Ont 5836 (S.C.C.) (Canada).

What makes the reasoning of these cases all the more compelling is that they refer to and/or adopt the reasoning of this Court in *Saks* to conclude that failure to warn of DVT is not an "accident."

In the decision of the House of Lords, the highest court in the United Kingdom, the Court found that DVT suffered by passengers during international transportation was not caused by an "accident" under Article 17. Applying the *Saks* definition of an "accident," Lord Scott held:

> 23. Of more importance for the present purposes is that nothing in the *Husain* case casts doubt upon the two important requirements of an article 17 accident that were established in Saks and have been applied fairly consistently ever since, namely, that an event or happening which is no more than the normal operation of the aircraft in normal conditions cannot constitute an article 17 accident and, second, that the event or happening that caused the damage of which complaint is made must be something external to the passenger.
>
> 24. These two requirements appear to me to rule out article 17 recovery in DVT cases where no more can be said than that the cramped seating arrangements in the aircraft were a causative link in the onset of the DVT. The failure by an airline to warn its passengers of the danger of DVT and the precautions that might be taken to guard against

> that danger does not, in my opinion, improve the case, at least where there is no established practice of airlines generally or of a defendant airline in particular to issue such warnings.

DVT Air Travel Group Litigation, [2005] UKHL 72 (House of Lords) December 8, 2005).

Since the Ninth Circuit's decision below comports with the decisions of sister signatories to the Warsaw Convention, the Ninth Circuit's decision furthers the goal of uniformity in the application and interpretation of the Convention as mandated by this Court in *Saks* and *Tseng*. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied in all respects.

Dated: January 12, 2007

Respectfully submitted,

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